87-160

No. _____

Supreme Court, U.S.
FILED
JUL 8 1987
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1987

WILLIAM F. GRANT,
Superintendent, Corrections Camp Program,
Petitioner,

v.

ROBERT E. CASPER,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT – CASE NO. 86-1639

PETITION FOR WRIT OF CERTIORARI

– AND APPENDIX –

CARL J. MARLINGA
Counsel of Record
PROSECUTING ATTORNEY
MACOMB COUNTY, MICHIGAN

WILLIAM A. DARDY
ASSISTANT PROSECUTING ATTORNEY
Macomb County Court Building
40 North Gratiot, Sixth Floor
Mt. Clemens, Michigan 48043
(313) 469-5641

Attorneys for Petitioner

Interstate Brief & Record Co., Suite 731, David Whitney Building, Detroit, MI 48226
(313) 962-8745

QUESTION PRESENTED FOR REVIEW

WHETHER THE *SANDSTROM* DECISION (*SANDSTROM* v *MONTANA*, 442 US 510), WHICH INVALIDATED JURY INSTRUCTIONS CREATING PRESUMPTIONS OF A DEFENDANT'S INTENT, SHOULD BE APPLIED RETROACTIVELY TO RE-OPEN CASES WHICH WERE FINAL AS OF ITS DECISIONAL DATE?

TABLE OF CONTENTS

	Page
Question Presented for Review	i
Table of Authorities	iv
Opinions Below	1
Constitutional Provisions Involved	2
Concise Statement of the Case	2
Argument Why the Writ Should Issue	6

Appendices:

Appendix A – DECISION, United States Court of Appeals for the Sixth Circuit – *May 7, 1987* .. A-1

Appendix B – JUDGMENT, United States District Court, Western District of Michigan, Southern Division – *June 26, 1986* B-1

Appendix C – ORDER APPROVING MAGISTRATE'S REPORT AND RECOMMENDATION, United States District Court, Western District of Michigan, Southern Division – *June 25, 1986* C-1

Appendix D – MAGISTRATE'S REPORT AND RECOMMENDATION, United States District Court, Western District of Michigan, Southern Division – *April 18, 1986* D-1

Appendix E – DECISION, Michigan Court of Appeals, *People* v. *Casper*, 25 Mich App 1 (1970) – *June 26, 1970* E-1

TABLE OF AUTHORITIES

Page

CASES:

Charles v. *Foltz*, 741 F.2d 834 (6th Cir. 1984) 6

Conway v. *Anderson*, 698 F.2d 282 (6th Cir.) *cert denied* 462 US 1121 (1983) 6

Dietz v. *Solem*, 640 F.2d 126 (8th Cir. 1981) 6

Engle v. *Koehler*, 707 F.2d 241 (6th Cir. 1983) . . . 6

Griffith v. *Kentucky*, __ US __, Nos. 85-5221 and 85-5731, 40 Cr. L 3169 (1987) 9

Guthrie v. *Warden, Maryland Penitentiary*, 683 F.2d 820 (4th Cir. 1982) 6

Linkletter v. *Walker*, 381 US 618; 85 S. Ct. 1731; 14 L Ed 2d 601 (1965) 8

Mackey v. *United States*, 401 US 667; 91 S. Ct. 1160; 28 L Ed 2d 404 (1971) 10

Merlo v. *Bolden*, 801 F.2d 252 (6th Cir. 1986) 6

Mullaney v. *Wilbur*, 421 US 684; 95 S. Ct. 1881; 44 L Ed 2d 508 (1975) 8

People [*Michigan*] v. *Casper*, 25 Mich App 1; 180 NW2d 906 (1970) 1, 4, 5

People [*Michigan*] v. *Woods* 416 Mich 581; 331 NW2d 707 (1982) 6, 7, 8, 9

Pigee v. *Israel*, 503 F. Supp. 1170 (E.D.Wis. 1980) 6, 7

Ramirez v. *Jones*, 683 F.2d 712 (2nd Cir. 1982) . . 6

Sandstrom v. *Montana*, 442 US 510; 99 S. Ct. 2450; 61 L Ed 2d 39 (1979) . . . . . *passim*

Page

Stovall v. *Denno*, 388 US 293; 87 S. Ct. 1967; 18 L Ed 2d 1199 (1967) 8

Tehan v. *United States*, 382 US 406; 86 S. Ct. 459; 15 L Ed 2d 453 (1966) 7

Williams v. *Engle*, 683 F.2d 152 (6th Cir. 1982) . . 6

SUPREME COURT RULE:

Supreme Court Rule 17.1(a) 9

No. _____

In The

Supreme Court of the United States

October Term, 1987

WILLIAM F. GRANT,
Superintendent, Corrections Camp Program,
Petitioner,

v.

ROBERT E. CASPER,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT – CASE NO. 86-1639

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

Petitioner, a prison warden and the respondent below in a habeas corpus proceeding, seeks review of an opinion and order of the United States Court of Appeals for the Sixth Circuit, dated May 7, 1987, in Case Number 86-1639, affirming a decision of the United States District Court for the Western District of Michigan granting a writ of habeas corpus for Robert E. Casper. Casper was convicted of first degree murder in Michigan in 1967. His conviction was affirmed by the Michigan Court of Appeals on June 26, 1970. *People* v. *Casper*, 25 Mich App 1; 180 NW2d 906 (1970). In 1979 Casper filed a delayed motion for new trial alleging he was denied his 14th Amendment right to due process in that the jury

instructions removed the factual issues of malice and intent from the jury. His motion was denied on the merits at all levels in the Michigan Court system. Casper filed for federal habeas relief on December 6, 1984. On June 26, 1986, the district court granted a conditional writ of habeas corpus ordering that the writ should issue unless Casper were retried within 90 days. The Court of Appeals affirmed, holding that the trial court's jury instructions unconstitutionally shifted the burden of proof on the intent issue. Casper has not been retried as of this date, since the mandate of the Court of Appeals has been delayed pending the Sixth Circuit's decision on petitioner's motion for stay pending submission of the within petition for writ of certiorari.

Petitioner comes to this Court by way of petition for writ of certiorari pursuant to 28 USC 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment 14 provides in part,

> "... nor shall any State deprive any person of life, liberty, or property, without due process of law; ..."

CONCISE STATEMENT OF THE CASE

In the late afternoon of December 23, 1966, a car with two occupants pulled into a gas station in Utica, Michigan. One of the station attendants, Alan Pringle, serviced the car. As Pringle was in the process of collecting money from the driver, he was shot by somebody from within the car. As he fell, money scattered around him on the ground. Pringle later died from the gunshot

wound. A subsequent audit revealed that $36.44 was missing.

The gas station manager who observed the shooting immediately called the police with a description of the car. The car was spotted and several police cars gave chase. The high-speed chase continued for approximately a half hour, ending with the subject car going out of control and coming to rest on the grassy median strip of the road.

David Bunker, the driver of the car and Robert Casper, the passenger, were placed under arrest and were subsequently charged with first degree (felony) murder following the death of the gas station attendant.

At trial it was established by the prosecution through the testimony of a ballistics expert that the gun which fired the fatal shot was the same gun the police had found along the chase route. The gun was linked to Bunker, the driver of the car, by virtue of similar ballistics markings found on spent bullets discovered in the basement of Bunker's home pursuant to a consent search. Several witnesses also testified that Casper was the owner of a gun similar to the gun which had been introduced into evidence as the murder weapon. Three witnesses testified that they had seen Casper in possession of the gun at Bunker's house, and two of these witnesses were present when both Bunker and Casper took turns firing the gun at a highchair in Bunker's basement.

Bunker took the stand and testified in his own defense. He testified that he was holding the gun when the fatal shot was fired. He asserted that he pulled the gun out of fear because the deceased grabbed his arm through the car window and that the gun discharged accidentally. He explained that he had previously fought with the deceased over a girl at a dance. He also claimed

that during the course of the high-speed chase he alone, without any help from Casper, threw the gun out the passenger side window. Casper did not testify.

In rebuttal, in order to discredit Bunker's testimony, the prosecution called the deceased's father to the stand, who testified that his son was crippled and that because of this condition he had never known his son to dance or to attend dances.

The theory of the prosecution's case against Casper was that he aided and abetted Bunker in an armed robbery attempt which resulted in a death. The key evidence against Casper was the condition of the gun and its location when it was found. It had been reloaded, wiped clean of fingerprints and was found along the right side, that is, the passenger's side of the road. Since the driver of the car, Bunker, had been involved in a high-speed chase, at times exceeding 110 miles per hour, the Michigan Court of Appeals held that "the jury would have been justified in concluding that defendant had handled the gun during the chase, wiped the fingerprints off and thrown it out of the car" (25 Mich App 1, 7; Appendix E, *infra*, E-6).

There is no support whatsoever in the record for the Sixth Circuit's mistaken opinion (reproduced as Appendix A, *infra*) that the prosecution was relying on a two-fold theory of premeditated murder and felony murder. There is no evidence in this case to show premeditation for either defendant, Bunker or Casper. Felony murder, with Bunker pulling the trigger in the course of a robbery and Casper assisting, was the only theory for both defendants.

The trial court instructed the jury on first degree murder, second degree murder, felony murder and manslaughter. The court also gave an admittedly invalid

instruction under *Sandstrom* v. *Montana,* 442 US 510 (1979), saying that the jury could infer the intent to kill by an act naturally tending to cause death or serious bodily injury. Although the instruction was erroneous it was mere surplusage since the prosecution had based its case on the intent to commit the underlying felony (robbery) and not on an intent to commit murder. Note, the portion of the prosecutor's closing argument quoted in the Sixth Circuit's opinion referring to a "deliberate premeditated act on the part of both of the accuseds" (Appendix A, *infra,* A-2) is, in context, a reference to the planned robbery — not a murder. Evidently the Sixth Circuit was misdirected by the word *premeditated,* presuming that it must have been modifying *murder* rather than its true usage in referring to deliberate premeditated *robbery.*

The jury returned a verdict of guilty of first degree murder on both defendants. In its general verdict, the jury did not specify whether the first degree verdict was based on premeditated murder or felony murder, either being a possible basis for first degree murder under Michigan law at the time.

On June 26, 1970, the Michigan Court of Appeals affirmed defendant Casper's conviction. In its opinion, the Michigan court dispensed with Casper's "mere presence" argument, holding that there was sufficient evidence for the jury to believe that Casper was "a knowing participant in an armed robbery" (25 Mich App 1, 5; Appendix E, *infra,* E-4).

In 1979, following this Court's decision in *Sandstrom* v. *Montana, supra,* and 12 years after his trial, Casper filed a delayed motion for new trial in the Michigan trial court relying on the *Sandstrom* error. On October 29, 1979, the trial court denied the motion.

On December 6, 1984, 17 years after his trial, Casper filed his petition for habeas corpus in the United States District Court for the Western District of Michigan. On June 26, 1986, the district court granted the writ (Appendix B, *infra* at B-1).

On May 7, 1987, the Court of Appeals for the Sixth Circuit affirmed.

ARGUMENT WHY THE WRIT SHOULD ISSUE

The retroactive application of *Sandstrom* v. *Montana*, 442 US 510; 99 S. Ct. 2450; 61 L Ed 2d 39 (1979) is an issue of overriding importance to all state and federal courts in the United States and it is an issue which, to date, has not been addressed by this Court.

The United States Court of Appeals in this case and others has repeatedly accorded *Sandstrom* full retroactive effect. *Merlo* v. *Bolden*, 801 F.2d 252, 255, n. 1 (6th Cir. 1986); *Conway* v. *Anderson*, 698 F.2d 282, 284 (6th Cir.) *cert denied* 462 US 1121 (1983); *Williams* v. *Engle*, 683 F.2d 152 (6th Cir. 1982); *Engle* v. *Koehler*, 707 F.2d 241 (6th Cir. 1983); and *Charles* v. *Foltz*, 741 F.2d 834 (6th Cir. 1984). Other circuits which have addressed this issue have reached the same result without extended analysis. *Guthrie* v. *Warden, Maryland Penitentiary*, 683 F.2d 820, 823 n. 3 (4th Cir. 1982); *Ramirez* v. *Jones*, 683 F.2d 712, 717 (2nd Cir. 1982); and *Dietz* v. *Solem*, 640 F.2d 126, 130 (8th Cir. 1981).

A contrary opinion against retroactive effect was voiced in a district court in *Pigee* v. *Israel*, 503 F. Supp. 1170 (E.D.Wis. 1980). Likewise, the Michigan Supreme Court in *People* v. *Woods*, 416 Mich 581; 331 NW2d 707 (1982) has rejected full retroactivity, limiting review of cases raising *Sandstrom* errors to only those defendants

whose cases were pending on direct appeal when *Sandstrom* was decided.

Notwithstanding the well-reasoned opinions in *Pigee* and *Woods, supra,* if this Court remains silent, the clear trend across the federal circuit courts of appeals will be to accord *Sandstrom* full retroactive effect.

The effect on the judicial system of the courts of the several states will be substantial. Thousands of cases — each by definition involving the taking of human life — will be subject to being re-opened, many, as the subject case, involving events which happened decades ago. The proof problems and the likelihood that convicted murderers will be set free due to missing or deceased witnesses and lost or destroyed exhibits are serious considerations arguing forcefully and reasonably against retroactive effect.

In *Pigee* v. *Israel, supra,* the Honorable Terence T. Evans wrote (503 F. Supp. 1170, 1177):

> Twenty-nine pattern Wisconsin jury instructions contained "presumption of intent language", including the instruction for first degree murder. The Wisconsin Division of Corrections states that between 1962, when the instruction was adopted, and 1979, when *Sandstrom* was decided, more than 300 persons were convicted of first degree murder in this state, no doubt many during trials in which the instruction was given. If *Sandstrom* is retroactively applied, many of those cases would have to be retried. The resultant burden on the criminal justice system and the terrible personal burden on the witnesses and the families and friends of the victims convince me that the ruling must not be retroactively applied.

In *People* v. *Woods, supra,* Michigan Supreme Court Justice Ryan (now Sixth Circuit Court of Appeals Judge Ryan) wrote for a unanimous Michigan Supreme Court as follows (416 Mich 581, 619-621; 331 NW2d 707):

> *Sandstrom,* on the other hand, dealt with the situation where jurors might think a conclusive or a burden-shifting presumption was established. It was a possibility. However, the probability of this occurring is far less in the *Sandstrom* situation than in the *Mullaney* [421 US 684; 95 S Ct. 1881; 44 L Ed 2d 508 (1975)] situation. Consequently, the truth-finding function is not as substantially impaired in a *Sandstrom* situation. Unlike the situation in *Mullaney,* there is no "clear danger of convicting the innocent". *Tehan* v. *United States,* 382 US 406, 416; 86 S Ct. 459; 15 L Ed 2d 453 (1966).
>
> * * *
>
> The probability of convicting an innocent person is minimal in the case where an instruction could as easily be construed by a reasonable juror in a permissible manner. Thus, the purpose of *Sandstrom* does not obviate the need to examine the other factors affecting retroactivity.
>
> The last two factors in the *Linkletter-Stovall* approach [*Linkletter* v. *Walker,* 381 US 618; 85 S Ct. 1731; 14 L Ed 2d 601 (1965); *Stovall* v. *Denno,* 388 US 293; 87 S Ct. 1967; 18 L Ed 2d 1199 (1967)] are the reliance on the old standards and the effect on the administration of justice. In Michigan, instructions similar to those used in the immediate case have been approved by the Michigan Supreme Court, (citations omitted) and by the Court of Appeals (citations omitted). Conceiv-

> ably other cases may be construed as having disapproved of such instructions; however, the existence of unreversed cases approving of such instructions shows that lower courts probably relied on them.
>
> Given this reliance, the effect full retroactivity would have on Michigan's system of justice is unacceptable. Since this Court long approved of such instructions, the number of cases where this instruction was used is surely enormous. Taking this into consideration with the purpose of the *Sandstrom* rule, we feel full retroactivity is unwarranted.
>
> However, we decide that retroactive application to those defendants whose cases were pending on direct appeal when *Sandstrom* was decided is required if the issue was properly raised and preserved.

Petitioner respectfully suggests that the reasoning of the opinion of the Michigan Supreme Court on this issue is superior to the opinions expressed by the Court of Appeals for the Sixth Circuit. Since Michigan lies within the Sixth Circuit and since Michigan trial judges are theoretically bound on this issue to follow both their own Supreme Court *and* the Sixth Circuit Court of Appeals as well, it is imperative, and consistent with the purposes of Supreme Court Rule 17.1(a) that this Court resolve the conflict. Petitioner also respectfully suggests that the reasoning of the Michigan Supreme Court is fully consistent with the rationale of this Court in its most recent retroactivity case, *Griffith* v. *Kentucky*, __ US __, Nos. 85-5221 and 85-5731 (1987), holding that a new constitutional rule representing a "clear break" with past precedent applies to all cases, state and federal, *pending on direct review or not yet final*. If such a result were to be

applied in this case, as it should be, defendant Casper's conviction, final for almost a decade prior to the *Sandstrom* decision, should be left undisturbed.

Collateral review of numerous long-final convictions based on the *possibility* that a misperception of standard instructional language may have affected the factual determination does not serve the ends of justice. As aptly stated by Justice Harlan in *Mackey* v. *United States*, 401 US 667, 691; 91 S. Ct. 1160; 28 L Ed 2d 404 (1971):

> While men languish in jail, not uncommonly for over a year, awaiting a first trial on their guilt or innocence, it is not easy to justify expending substantial quantities of the time and energies of judges, prosecutors, and defense lawyers litigating the validity under present law of criminal convictions that were perfectly free from error when made final.

For these reasons petitioner requests that this Court issue a writ of certiorari to the United States Court of Appeals for the Sixth Circuit in order to review the issue raised herein and upon review to reverse the opinion of the Court of Appeals of May 7, 1987.

Respectfully submitted,

By: /s/ CARL J. MARLINGA
Counsel of Record
PROSECUTING ATTORNEY
MACOMB COUNTY, MICHIGAN

By: WILLIAM A. DARDY
ASSISTANT PROSECUTING ATTORNEY
Macomb County Court Building
40 North Gratiot, Sixth Floor
Mt. Clemens, Michigan 48043
(313) 469-5641

Attorneys for Petitioner

Dated:
July 2, 1987

APPENDICES

• • •

APPENDIX A

DECISION

(United States Court of Appeals for the Sixth Circuit)

(Filed May 7, 1987)

(ROBERT E. CASPER, Petitioner-Appellee, v. WILLIAM F. GRANT, Superintendent, Corrections Camp Program, Respondent-Appellant — No. 86-1639; ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN)

Before: MARTIN, MILBURN, Circuit Judges, and BROWN, Senior Circuit Judge.

PER CURIAM

Robert Casper petitions this court for a writ of habeas corpus, asserting that the trial court's jury instructions unconstitutionally shifted the burden of proof regarding intent in his trial for first degree murder. The district court adopted the recommendation of the magistrate below and granted a conditional writ of habeas corpus. We have reviewed the record and heard oral argument in this case and we now affirm the district court and order that the writ of habeas corpus be granted.

Robert Casper was convicted of first degree murder in Michigan, following a jury trial in May of 1967, and was sentenced to life imprisonment with his co-defendant David Bunker. His conviction was affirmed by the Michigan Court of Appeals on June 26, 1970. *People* v. *Casper*, 25 Mich. App. 1 (1970). In 1979 Casper filed a delayed

motion for a new trial alleging he was denied his 14th Amendment right to due process in that the jury instructions removed the factual issue of malice from the jury. That motion was denied on the merits at all levels in the Michigan court system. Casper filed for federal habeas relief on December 6, 1984, and it is the district court's 1986 judgment that we now affirm on the basis that the trial court's instructions on intent violated *Sandstrom* v. *Montana*, 442 U.S. 510 (1979) and created reversible error.

On December 23, 1966, Robert Casper was a passenger in a stolen car driven by David Bunker when Bunker shot a gas station attendant who had just finished pumping gas for them. The car sped off and the two were apprehended after a high speed chase. The gun was later found along the side of the road and thirty-six dollars were found missing from the victim's cash.

Robert Casper did not take the stand in his own defense but David Bunker testified in his behalf, attempting to characterize Casper as an innocent bystander. In closing argument, Casper's attorney strongly urged that he lacked the requisite intent to commit the murder and that he was merely present when it occurred. The prosecutor said in his closing argument "[it] is the People's contention that this was a wilful, deliberate premeditated act on the part of both of the accuseds". Thus, it is not true, as appellants argue, that the prosecution's sole theory for conviction was felony murder. Rather, intent was a crucial issue at trial. That Casper did not pull the trigger is of no consequence since his probable acts of reloading the gun and throwing it out the window during the chase would make him an accessory after the fact.

In his instructions to the jury, the Michigan Circuit Judge did not instruct solely on the theory of felony murder. Rather, he instructed on first degree murder, second degree murder, felony murder and manslaughter. He then proceeded to give instructions on intent which are indisputably in violation of *Sandstrom* v. *Montana*.

A part of the judge's instructions were as follows:

> When certain facts exist, the law provides that you, the jury, shall presume an intent to kill exists unless evidence to the contrary is offered. When certain facts exist the law provides that you may infer an intent to kill. . . .
>
> Now, in this case a gun was used. I instruct you that the law presumes an intent to kill if a person kills another or contributes to the death of another or accelerates the death of another by an act naturally tending to cause death or serious bodily injury and there is no evidence to the contrary. I instruct you, as a matter of law, that you may presume an intent to kill if you find the gun, that death came about by a wound inflicted by the shot of a gun because a gun, the shooting of a human being by a gun is an act naturally tending to cause death or naturally tending to cause serious bodily injury. . . . In a case of this kind it would be rather ridiculous to presume that this particular gun, that the natural consequences of a wound by this particular gun would not be to kill or not to inflict great, serious bodily injury on another human being.

Such instructions, *Sandstrom* holds, might reasonably allow the jury to conclude that they are directed to find against the defendant on the element of intent once another element of the crime (causing death) is estab-

lished. 442 U.S. 510, 523. This then removes the State's burden of proving each element "beyond a reasonable doubt" as required by *In re Winship*, 397 U.S. 358, 364 (1970).

After approximately fifteen minutes of deliberation, the jury returned general verdicts of guilty of first degree murder against both defendants. In these general verdicts lies the crux of the problem.

At oral argument the State conceded that a *Sandstrom* error had occurred. Its argument however was that under *Logan* v. *Abshire*, 778 F.2d 283 (6th Cir. 1985), this error was harmless. The Court in *Logan* found that in a felony murder case, the government need only show intent to commit the underlying felony (robbery), and that therefore the instruction was harmless beyond a reasonable doubt. 778 F.2d 283, 284. We now distinguish *Logan* since in that case it was clear that the defendant was convicted of felony murder. Here, we have no way of knowing on which theory the jury based its conviction, and such persuasion-shifting instructions may well have affected the outcome of the trial. Unlike the circumstances in *Martin* v. *Foltz*, 773 F.2d 711 (6th Cir. 1985), here, lack of requisite intent was affirmatively asserted at trial. A *Sandstrom* instruction thus may have served to frustrate this defense and was therefore "extremely prejudicial". 773 F.2d 711, 719.

For the foregoing reasons we find that the error committed by the trial court was not harmless. Because *Sandstrom* has repeatedly been held in this circuit to apply retroactively, *Merlo* v. *Bolden*, 801 F.2d 252, 255, n. 1 (6th Cir. 1986); *Conway* v. *Anderson*, 698 F.2d 282, 284 (6th Cir.), *cert. denied*, 462 U.S. 1121 (1983), we affirm the judgment of the district court and order that the conditional writ of habeas corpus be granted.

APPENDIX B

JUDGMENT

(United States District Court —
Western District of Michigan — Southern Division)

(Filed June 26, 1986)

(ROBERT CASPAR [*sic*], Petitioner, v. WILLIAM GRANT, Respondent — File No. G84-1306 CA)

At a session of said Court held in and for said District and Division, in the City of Grand Rapids, Michigan, this 26th day of June, 1986.

PRESENT: HONORABLE BENJAMIN F. GIBSON,
DISTRICT JUDGE.

In accordance with the Order Approving Magistrate's Report and Recommendation dated June 25, 1986, IT IS HEREBY ORDERED that petitioner's application be granted and a writ of habeas corpus be issued unless petitioner is retried within ninety (90) days of the date of this judgment.

IT IS SO ORDERED.

/s/ BENJAMIN F. GIBSON
U.S. DISTRICT JUDGE

APPENDIX C

ORDER APPROVING MAGISTRATE'S REPORT & RECOMMENDATION

(United States District Court —
Western District of Michigan — Southern Division)

(Dated June 25, 1986)

(ROBERT CASPAR [*sic*], Petitioner, v. WILLIAM GRANT, Respondent — File No. G84-1306 CA)

At a session of the Court held in and for said District and Division in the City of Grand Rapids, Michigan, this 25th day of June, 1986.

PRESENT: HONORABLE BENJAMIN F. GIBSON,
DISTRICT JUDGE.

The Court has reviewed the Report and Recommendation filed by the United States Magistrate in this action. The Court has also given new consideration and made a *de novo* determination of those portions to which specific objection has been made.

Pursuant to such review and determination, IT IS ORDERED that the Report and Recommendation of the Magistrate is approved and adopted as the opinion of the Court.

IT IS SO ORDERED.

/s/ BENJAMIN F. GIBSON
U.S. DISTRICT JUDGE

(*Certification Omitted*)

APPENDIX D

MAGISTRATE'S REPORT AND RECOMMENDATION

(United States District Court —
Western District of Michigan — Southern Division)

(Dated April 18, 1986)

(ROBERT CASPAR [*sic*], Petitioner, vs. WILLIAM GRANT, Respondent — Case No. G84-1306 CA)

Robert Caspar has petitioned this court for a writ of habeas corpus. As the basis for federal habeas relief, petitioner asserts that the trial court's instructions unconstitutionally shifted the burden of proof regarding intent. For the reasons discussed below, I respectfully recommend that petitioner's request be granted and that a writ of habeas corpus be issued unless petitioner is retried within 90 days of this court's decision.

Petitioner was convicted of first degree murder in May, 1967, and sentenced to life imprisonment, following a jury trial in Macomb County Circuit Court. Following his conviction, petitioner filed an appeal as of right. His conviction was affirmed by the Michigan Court of Appeals on June 26, 1970. *People* v. *Caspar*, 25 Mich. App. 1 (1970). On March 7, 1979, petitioner filed a delayed motion for a new trial which raised the issue of whether the trial court's instructions on murder removed the factual issue of malice from the jury, thereby depriving him of a fair trial in violation of his 14th Amendment right to due process. This motion was denied on the merits on October 16, 1979. Plaintiff filed a delayed application for leave to appeal this issue in the Court of Appeals, and the application was denied for lack of merit on August 19, 1980. The Michigan Supreme

Court denied an application for leave to appeal on June 19, 1981.

Petitioner filed for federal habeas relief on December 6, 1984. Having exhausted his state-afforded remedies, petitioner's application for a writ of habeas corpus is properly before this court for review. The sole issue presented is whether the trial court's instructions on intent constitute reversible error under *Sandstrom* v. *Montana*, 442 U.S. 510 (1979).[1]

On the afternoon of December 23, 1966, petitioner was a passenger in a vehicle driven by his co-defendant David Bunker. Bunker had stolen the car earlier in the day from a shopping mall parking lot. Bunker drove the car to a gas station in Utica, where the attendant, Allen Pringle, pumped two dollars worth of gas into the car. An eye-witness reported that he saw Pringle go to the driver's side of the car. The witness said he turned away from the scene, heard a loud report, and turned back to see Pringle stumbling away from the car while money was fluttering in the air. The vehicle sped off and petitioner and Bunker were apprehended after a high speed chase. The gun used to shoot Pringle was found on the right side of the road along the route of the chase.

At trial, the prosecution argued that Pringle was murdered during the course of a robbery and that petitioner had aided and abetted in these acts. Bunker, however, testified that he recognized Pringle as someone he had fought with on a prior occasion. Bunker stated that Pringle reached through the car window to assault him. Bunker said he pulled a gun in self-defense and that it discharged accidentally, striking Pringle. Bunker also

---

[1] *Sandstrom* has been given retroactive application in this circuit. *See, e.g., Conway* v. *Anderson*, 698 F.2d 282, 284 (6th Cir. 1983); *Engle* v. *Kohler*, 707 F.2d 241, 244 (6th Cir. 1983); *Williams* v. *Engle*, 683 F.2d 152 (6th Cir. 1982).

testified that he threw the gun away through the passenger side window with a sidearm motion. Bunker further stated that he did not tell petitioner that the vehicle was stolen and had not discussed any robbery attempt with him. Petitioner did not testify at trial.

In his closing statement, petitioner strongly argued that he lacked the requisite intent and that his only involvement in the affair was that he was present when it happened.

The trial judge instructed the jury on felony-murder, first and second degree murder and manslaughter. An aiding and abetting instruction was given. The jury returned a general verdict of guilty without specifying whether it was based on felony murder or first degree premeditated murder.

With respect to the element of intent regarding the instructions on first degree murder, the trial court instructed the jury as follows:

> "Now, what is the difference between a presumption of a fact and an inference of a fact. *When certain facts exist, the law provides that you, the jury, shall presume an intent to kill exists unless evidence to the contrary is offered.* When certain facts exist the law provides that you may infer an intent to kill. In other words, the presumption of a fact is required, it is compulsory under certain conditions and an inference of a fact is permissible under certain conditions. A presumption is a conclusion you must draw and an inference is a conclusion you may draw from all the facts and circumstances in the case and that is your distinction and that is what an inference is. An inference is a reasonable, logical conclusion you may

draw from all the circumstances, all of the facts, in the case.

Now, in this case a gun was used. *I instruct you that the law presumes an intent to kill if a person kills another or contributes to the death of another or accelerates the death of another by an act naturally tending to cause death or serious bodily injury and there is no evidence to the contrary. I instruct you, as a matter of law, that you may presume an intent to kill if you find the gun, that death came about by a wound inflicted by the shot of a gun because a gun, the shooting of a human being by a gun is an act naturally tending to cause death or naturally tending to cause serious bodily injury.* I call your attention to those words by an act naturally tending to cause death or serious bodily injury. That is the key to this rule of law. Before you may presume an intent to kill you must be convinced beyond a reasonable doubt that the acts of the defendant or defendants or the weapon used or the manner in which the weapon was used naturally tended to cause death or naturally tended to cause serious bodily injury. If you are not so convinced beyond a reasonable doubt you must not, of course, presume an intent to kill. *In a case of this kind it would be rather ridiculous to presume that this particular gun, that the natural consequences of a wound by this particular gun would not be to kill or not to inflict great, serious bodily injury on another human being.*

Now going further even if you do conclude that the act or weapon or manner in which it was used would naturally tend to cause death or serious bodily injury but if there is evidence to the contrary then you must not in that case pre-

BEST AVAILABLE COPY

sume an intent to kill." (Trial Transcript at 1352-54) (emphasis added)

At the conclusion of the trial court's charge, the jury retired to deliberate and returned general verdicts of guilty of first degree murder against both defendants in approximately 15 minutes.

It is incumbent upon a State to prove beyond a reasonable doubt every fact necessary to constitute the crime charged, *In re Winship*, 397 U.S. 358 (1970), and the State may not shift the burden of proof to the defendant. *Patterson* v. *New York*, 432 U.S. 197 (1976).

It is readily apparent that a reasonable juror could have given the presumption in the instruction in this case either conclusive or persuasion-shifting effects, and either would constitute a denial of due process. *Sandstrom* v. *Montana*, *supra*, at 519-524.

At best, the plain import of the instruction was that if the jury found that Pringle's death was caused by the discharge of a gun, then it should be presumed that there was an intent to kill unless evidence was presented to the contrary. This type of persuasion-shifting instruction was held constitutionally infirm by the *Sandstrom* court, since a reasonable juror could well have assumed that the defendant was required to come forward with some evidence to rebut the presumption. *See also*, *Engle* v. *Kohler*, 707 F.2d 241, 244, 45 (6th Cir. 1983), *aff'd by an equally divided court*, __ U.S. __, 104 S.Ct. 1673 (1984).

The *Sandstrom* error cannot be declared a harmless one in this case. In *Martin* v. *Foltz*, 773 F.2d 711 (6th Cir. 1985), the court noted that where the element of *mens rea* is an issue — "for example, where a defense of lack of requisite intent is affirmatively asserted at trial," — *Sandstrom* errors are capable "of being extremely pre-

judicial." *Id.* at 719. The potential for prejudice exists even when "overall proof of intent or malice is substantial." *Engle*, 707 F.2d at 246.

The proofs in this case concerning petitioner's intent show that he had a close association with his co-defendant and had used the gun for target practice some time prior to the day of the shooting. On the day of the incident, petitioner was a passenger in the vehicle stolen by Bunker and was present at the shooting. In arguing the case to the jury, petitioner did not attempt to establish mistaken identity, nor was an alibi defense offered. Rather, petitioner argued that the prosecution was attempting to establish his guilt by the fact that he was present during the incident. Under these circumstances, plaintiff's state of mind was crucial, and the error in the instructions cannot be considered harmless. In fact, since the instructions state in three separate places that the presumption regarding intent is operative unless there is proof to the contrary, a reasonable juror, realizing that petitioner had offered no witnesses or his own testimony to negate the presumption, could have concluded that petitioner's intent had been conclusively and affirmatively established by virtue of the fact a gun was used.

For the reasons above, I conclude that a *Sandstrom* error was present in the trial court's instructions and has been properly presented to this court. I further conclude that this error was not harmless and therefore am constrainted [*sic*] to recommend that petitioner's application be granted and that a conditional writ be issued by the court.

/s/ Hugh W. Brenneman, Jr.
United States Magistrate

Dated: 4/18/86

APPENDIX D

DECISION

(State of Michigan — Court of Appeals)

(Decided June 26, 1970)

(PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v. ROBERT CASPER, Defendant-Appellant — Appeal from Macomb, Howard E. Carroll, J.; Submitted Division 2 May 14, 1970, at Lansing (Docket No. 7,836))

Robert Irwin Casper was convicted of first-degree murder. Defendant appeals. Affirmed.

Before: LESINSKI, C.J.,
and QUINN and ROOD,* JJ.

LESINSKI, C.J.

Defendant Robert Casper and another man, David Bunker, were convicted of first-degree murder, MCLA § 750.316 (Stat Ann 1954 Rev § 28.548), following a trial by jury. The codefendants were sentenced to life imprisonment. Defendant Casper appeals as of right.[1]

During the late afternoon on December 23, 1966, a red, 1962 Chevrolet convertible with a white top, pulled into the Clark Service Station on Van Dyke Avenue in the City of Utica. One of the station attendants, Alan Pringle, serviced the car. He put $2 worth of gasoline into the car, then went to the driver's side for payment.

At this time the station manager came out of the station to see if he could give assistance. He observed the pump turned off at $2 worth of fuel and started back

---

* *Footnotes omitted in printing.*

toward the building while Pringle went to collect from the driver. When the manager was approximately eight to ten feet from the car he heard a loud report. He turned and saw Pringle slumping to the pavement with money falling around him. The red convertible immediately left the station at a high speed.

Shortly after the incident members of the Sterling Township Police Department observed an automobile matching the description of the car seen at the service station and gave chase. The chase, at speeds up to 110 miles per hour, led through the City of Warren and several subdivisions. The car managed to avoid a police roadblock at one point, but finally went out of control after hitting another vehicle and came to a stop on the median strip of Mound Road.

David Bunker, the driver of the red Chevrolet, and defendant, the passenger, were immediately placed under arrest. Both were subsequently charged with first-degree murder, following the death of Alan Pringle.

At trial it was established by the prosecution through the testimony of a qualified ballistics expert that the gun which fired the fatal shot was the same gun which the police found along the chase route shortly after the chase. It was also established that the same gun had shot several bullets found in the basement of Bunker's home. The bullets from Bunker's basement were found there during a police search conducted several days after the crime.

At the joint trial held below, David Bunker testified in his own defense. Both the prosecutor and defendant's attorney cross-examined Bunker. On appeal defendant challenges the propriety of the scope of the prosecutor's cross-examination on the grounds that it tended to ques-

tion defendant's character, when defendant had not placed his character in issue.

Our review of the record satisfies us that defendant's contention is without merit. The thrust of the cross-examination was an effort to show a close friendship between Bunker and defendant. The only questions which might be interpreted as attacking defendant's character are those establishing that defendant played cards with Bunker and implying that the two may have gotten drunk together. The line of questioning did not extend to unreasonable lengths and was not challenged below by objection until the prosecutor began a different topic by asking Bunker whether he knew if defendant was employed. As soon as defendant did object, the prosecutor ended the line of questioning.

Defendant also alleges on appeal that there was insufficient evidence adduced below to establish guilt beyond a reasonable doubt. It is defendant's position that although he was present in the car that he did not know it was a stolen automobile, did not know that David Bunker planned anything other than the purchase of gasoline when they drove into the Clark station, and was not involved in the shooting.

MCLA § 767.39 (Stat Ann 1954 Rev § 28.979), provides:

> "Every person concerned in the commission of an offense, whether he directly commits the act constituting the offense or procures, counsels, aids, or abets in its commission may hereafter be prosecuted, indicted, tried and on conviction shall be punished as if he had directly committed such offense."

However, as stated in *People* v. *Burrel* (1931), 253 Mich 321, 323:

> "'Mere presence, even with knowledge that an offense is about to be committed or is being committed, is not enough to make a person an aider or abettor or a principal in the second degree nor is mere mental approval, sufficient, nor passive acquiescence or consent.'"

Thus, if defendant's allegations regarding his participation are true, he is not guilty.

On appeal this Court must determine whether evidence exists which, if believed by the jury, warrants the conclusion that defendant was a knowing participant in an armed robbery. The weight to be given testimony is for the sole consideration of the jury. This Court on review does not substitute its judgment for that of the triers of fact who heard the testimony of the witnesses and observed their demeanor. *People* v. *Schram* (1965), 1 Mich App 279; *People* v. *Panknin* (1966), 4 Mich App 19. As noted in *People* v. *Person* (1969), 20 Mich App 246, 248:

> "It is not the function of an appellate court to be a reviewing jury. *People* v. *Eagger* (1966), 4 Mich App 449. This Court's proper role is to examine the record on appeal to determine whether the jury's finding of fact is supported by credible evidence. *In re Petition of Molisak* (1939), 291 Mich 46. Accordingly, this Court will not disturb the verdict unless the evidence fails to support the finding of fact. *People* v. *Floyd* (1966), 2 Mich App 168."

The record discloses evidence which, if believed, supports the following facts. Defendant and David Bunker had known each other for approximately six months to a year and had grown to be very close friends. They saw each other several times a week, double dated together

and Bunker had loaned defendant money on several occasions.

During the day of the shooting Bunker had cashed his pay check and still had approximately $65 in cash with him when he and defendant drove into the gas station. Defendant, however, was without money of his own.

Several witnesses testified that on a number of occasions during November and December of 1966, defendant was seen at Bunker's home in possession of the automatic pistol which became the murder weapon. The prosecutor's witnesses did not know, however, whether defendant was the owner of the gun or whether Bunker owned it.

On the day of the shooting defendant had been with Bunker since before noon. They had been driven to a shopping center by Bunker's parents. The two spent some time shopping. During this time Bunker stole a car from the parking area and the two used it for transportation. Bunker testified, however, that defendant was not with him when the car was stolen, that defendant was at the commissary eating at the time, that Bunker had told defendant to stay there so he could get a Christmas present for defendant, and that when he appeared with the car he told defendant a friend had loaned the car to him. Bunker and defendant then drove home. Later in the afternoon they left again.

Evidence was admitted below that the gun was thrown out of the car along the chase route. The gun was found on the right shoulder although Bunker was driving in the left lane at the time. The gun had been wiped free of fingerprints. A live bullet was in the chamber although the pistol's clip was missing. From this evidence coupled with the testimony that Bunker was driving the car at nearly 100 miles per hour at the

time, the jury would have been justified in concluding that defendant had handled the gun during the chase, wiped the fingerprints off and thrown it out of the car.

Michigan authority appears uniform in holding that actions by the defendant such as flight to avoid lawful arrest, procuring perjured testimony and attempts to destroy evidence, while possibly as consistent with innocence as with guilt, may be considered by the jury as evidence of guilt. *People* v. *Lewis* (1933), 264 Mich 83; *People* v. *Bunker* (1970), 22 Mich App 396. As noted in *People* v. *Cipriano* (1927), 238 Mich 332, 336:

> "'[F]light from the scene of a tragedy may be as consistent with innocence as with guilt;' but it is always for the jury to say whether it is under such circumstances as to evidence guilt."

We conclude that in light of defendant's close friendship with Bunker, his presence at the scene of the crime, his prior association with the murder weapon, his lack of funds as a possible motive, and the permissible finding that he wiped the murder weapon clean of fingerprints and made every effort to get rid of it, the jury had before it sufficient evidence to believe defendant was an accomplice to David Bunker in the planning and execution of a crime resulting in murder. While evidence does exist (consisting largely of Bunker's testimony) which is consistent with defendant's alleged innocence, it is not the function of this Court to second-guess the finder of fact below. Defendant's arguments were presented to the jury and were rejected. The jury was justified in so doing.

Affirmed.

All concurred.